

Minister Calviño Santamaría
Council of the European Union
Rue de la Loi 175, 1040 Brussels
Belgium

Brussels, July 2023

Dear Minister Calviño Santamaría,

American businesses would like to express their concern about the potential extraterritorial effects of provisions in the Council General Approach on the AML Regulation. Such a broad application of the concept of a ‘business relationship’ is incompatible with the Interpretive Note on Recommendation 24 of the Financial Action Task Force (FATF)¹, which requires entities to have a sufficient linkage with the country.

Our reading of this new provision is that EU obliged entities could in future not enter into a commercial relationship with a third country entity or supplier unless that third country entity or supplier is registered in the EU Beneficial Ownership registry. Moreover, the EU entity would require proof of that registration before entering into a business relationship (article 19).

Such a provision would not address money laundering and terrorist financing (ML/TF) concerns and it would be excessive as obliged entities are already required to identify their customers’ beneficial owners and verify their identity. The mechanisms currently in place already ensure that information regarding beneficial owners is available in case required by a competent authority .

Furthermore, not every third country entity or supplier will know about the EU rules and could therefore inadvertently find themselves in breach of the EU’s extraterritorial provisions. This has already occurred with the registration regime for third country benchmark administrators, where the EU has suspended the rules because they were deemed impractical and impossible to implement. In the case of the ML/TF registers, this would become an even larger problem given the number of potential entities involved and the impact on all types of commercial relationships.

Moreover, even if an entity or supplier were willing to comply with these new rules, it would raise questions on where and how they would need to register. This could lead to multiple entities in Beneficial Ownership (BO) registers across the EU. Again, the Interpretive Note on Recommendation 24 of the FATF requires BO information to be easily accessible to competent authorities.

¹ Interpretative Note to Recommendation 24: Competent authorities should be able to obtain, or have access in a timely fashion to, adequate, accurate and up-to-date information on the beneficial ownership and control of companies and other legal persons (beneficial ownership information⁴⁷) that are created⁴⁸ in the country, as well as those that present ML/TF risks and have sufficient links⁴⁹ with their country (if they are not created in the country). Countries may choose the mechanisms they rely on to achieve this objective, although they should also comply with the minimum requirements set out below. Countries should utilise a combination of mechanisms to achieve the objective.

Footnote 49: Countries may determine what is considered a sufficient link on the basis of risk. Examples of sufficiency tests may include, but are not limited to, when a company has permanent establishment/branch/agency, has significant business activity or has significant and ongoing business relations with financial institutions or DNFBPs, subject to AML/CFT regulation, has significant real estate/other local investment, employs staff, or is a tax resident, in the country.

Looking at the economic implications, these provisions would ultimately put the EU in a competitive disadvantage vis-a-vis jurisdictions without such additional requirements. They would potentially cut off the European and international financial services industry operating in Europe from entities in the international supply chain. This could impact established correspondence banking relationships, well-established outsourcing arrangements but also access to other important financial services, such as international insurance coverage. The relevant provisions are attached in Annex 1.

AmCham EU calls on the Council to delete article 17 (3) and provide exemptions to article 48, eg where an entity is established in a jurisdiction with equivalent standards and requirements as the EU. Of course, we would also welcome the opportunity to discuss this with you in greater detail.

Best regards,
AmCham EU

Annex 1

Article 17(3): *Obligated entity shall not enter into business relationship with a legal entity incorporated outside the Union or with legal arrangement administered outside the Union, whose beneficial ownership information are not held in the central register referred to in Article 10 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final], except in case where an obliged entity entering into business relationship with legal entity operates in sector that is associated with low ML/TF risks and the business relationship or intermediated or linked transactions do not exceed EUR 250 000 or the equivalent in national currency.*

Where the obliged entity entered into business relationship and the conditions of exception under first subparagraph are not met anymore, the obliged entity shall notify the customer thereof without undue delay. If the beneficial ownership information is not reported in the central register referred to in Article 10 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final] within 14 calendar days following the notification from the obliged entity, the obliged entity shall terminate the business relationship, or adopt alternative measures under paragraph 1.

Article 48: *Beneficial ownership information of legal entities incorporated outside the Union or of express trusts or similar legal arrangements administered outside the Union or whose trustee or the person holding an equivalent position is established or resides outside the Union shall be held in the central register referred to in Article 10 of Directive [please insert reference – proposal for 6th Anti-Money Laundering Directive - COM/2021/423 final] set up by the Member State where such entities or trustees of express trusts or persons holding equivalent positions in similar legal arrangements acting in the name of the express trust or similar legal arrangement:*

- a. acquire real estate in their territory;*
- b. are awarded a public procurement for goods, services or concessions;*
- c. enter into a business relationship with an obliged entity except in case of the legal entities which enter into a business relationship with an obliged entity that operates in sector that is associated with low ML/TF risks and the business relationship or intermediated or linked transactions do not exceed EUR 250 000 or the equivalent in national currency.*